Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari
To The United States Court
of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an employee speak about matters of public concern when she:

a. complains that tax dollars raised through a special levy are not being used for their intended purpose;

b. complains that her employer is engaging in defiant and potentially corrupt activities with regard to the future spending of levy funds; and

c. advises the public that a potential patient endangerment situation exists at a public hospital where she is employed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari
To The United States Supreme Court

Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully request this Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review its decision entered August 8, 1984 vacating a judgment in Petitioner's favor.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals entered August 8, 1994 is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction on this Court to review the judgment below the writ of certiorari is 28 U.S.C. §1254 which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion or free exercise thereof; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutional and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Introduction

Twenty five years ago, this Court held that a school teacher's letter to a newspaper criticizing the school board's method of informing taxpayers about the need for additional revenue and its allocation of funds between athletics and academics was speech about a matter of public concern. Pickering v. Bd of Education, 391 U.S. 563 (1968). The Pickering decision is the cornerstone of First Amendment jurisprudence.

Like Mr. Pickering, Petitioner Rosemary Rahn complained about her employer's spending of tax revenues raised through a special election. Like Pickering, she complained about the allocation of those funds between relandscaping Drake Hospital's grounds and providing care for Drake's indigent residents. Like Pickering, Rahn sought

to educate the voting public that their tax dollars were not being spent for their intended use. Rahn went further than Pickering, however, and advised the public that Earl Gilreath, the President of Drake, stated that he would spend $100,000,000 in bond money "any way he wanted."

Despite the nearly identical complaints raised by Pickering and Rahn, in a 2-1 decision, a panel of the Sixth Circuit reversed a judgment in Rahn's favor. The court held that her speech did not relate to matters of public concern. Instead, she was characterized as a "disgruntled employee" who complained only about Drake's "internal office policy."

The decision of the panel is directly at odds with Pickering. It also conflicts with this Court's decisions in Connick v. Meyers, 461 U.S. 138 (1983), Mount Healthy School Bd. v. Doyle,

429 U.S. 274 (1977) and Rankin v. McPherson, 483 U.S. 378 (1978). In addition, the opinion conflicts with the Second Circuit's decision in Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2nd Cir. 1983), where the court held that allegations of waste and corruption at a large municipal hospital obviously involved a matter of public concern.

Absent intervention by the Court, the Sixth Circuit's decision will be cited for the proposition that complaints about improper spending of tax dollars, criticism of potentially corrupt and illegal spending practices, and concerns about patient care at a publicly owned hospital do not relate to matters of public concern.

As outlined more fully below, the panel's decision should be reversed.

B. Procedural Background

Petitioner sued Drake Center pursuant to 42 U.S.C. §1983 on January 11, 1991 for violation of her rights under the First Amendment.

After discovery, Drake Center filed a motion for summary judgment. The motion was denied and the case proceeded to trial.

The case was tried in April of 1992. At the conclusion of the evidence, the United States District Court for the Southern District of Ohio held as a matter of law that Petitioner's speech about the spending of tax monies, possible corruption by Drake management, and the potential for poor care of Drake's indigent patients related to matters of public concern. Because Rahn's speech was not disruptive in any way to the operation of Drake, the district court further concluded that her speech was protected

by the First Amendment. A jury then determined that Rahn was fired because of her speech and returned a verdict in her favor for $71,723. The district court thereafter denied Drake's motion for judgment notwithstanding the verdict and awarded Petitioner fees and costs in the amount of $59,274.

Drake Center appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit. On August 8, 1994, in a 2-1 decision, the court held that Petitioner's speech did not relate to matters of public concern. Instead, the court held, Petitioner was simply a disgruntled employee complaining about management's competence. The judgment was vacated.

Petitioner then filed a petition for rehearing en banc in the Sixth Circuit. That

request was denied on December 7, 1994. Petitioner sought and obtained an extension of time until April 6, 1995 to file her petition.

C. Statement of Facts

Petitioner Rosemary Rahn is a nurse who worked at Drake Hospital, a County owned and operated long-term care facility, for about seven years.

In May of 1989, a special tax levy to raise funds to save Drake Hospital was put on the ballot. Rahn, who was concerned about Drake's continued existence, worked to support the levy. She and other voters were never told that if the levy passed, the operation of Drake Hospital would be turned over to a private corporation, Drake Center. The levy passed, and Drake Center took over the operation of the County owned

hospital on July 1, 1989.

On July 18, 1989, acting as the Chairperson for the Committee to Maintain and Improve Drake Hospital, Rahn delivered a press release to local public officials and the media which was critical of the way Earl Gilreath, the President of Drake Center, was running the facility. Rahn questioned Gilreath's spending of tax monies raised through the special levy for Drake Hospital. She noted that tax levy funds were used to create a new "private" organization, Drake Center, which was viewed by Gilreath as beyond the public's scrutiny. She complained that Gilreath was spending taxpayer dollars on relandscaping the grounds at Drake instead of on care for Drake's indigent patients. She voiced concern that Gilreath threatened to spend the bond funds "any way I want to," and that rather

than maintaining Drake Hospital for the poor, Gilreath planned to change the patient mix and relocate 75% of Drake's existing indigent patients to make room for private patients. Rahn also stated that because of high absenteeism by the staff, a possible patient endangerment situated existed. She was critical of other aspects of the administration, including its failure to provide short and long range goals for the hospital, and its failure to seek input from staff, patients, their families and the citizens of Hamilton County. (Slip Opinion at 7-9). She sought an open meeting of County officials, and representatives of the University of Cincinnati, which was involved in the creation and operation of Drake Center to address and resolve the Committee's concerns.

On July 21, 1989, three days after her

speech, Rahn was sent a letter by courier advising her that she violated Drake Center's attendance policy. On July 25, 1989, she was fired.

Rahn filed suit in district court, alleging that Drake fired her in violation of her First Amendment rights. As noted above, the district court held that Rahn's speech was protected and the jury determined that Rahn was fired because of her speech.

ARGUMENT: REASON FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH AUTHORITY FROM THIS COURT AND SETS AN UNACCEPTABLE PRECEDENT WHICH WILL DISCOURAGE EMPLOYEES FROM SPEAKING OUT ON MATTERS OF PUBLIC CONCERN

This Court has made it clear that the state cannot discharge employees on a basis that

infringes upon their interest in freedom of speech. Rankin v. McPherson, 483 U.S. 378, 383 (1983). In a long line of cases, the Court has stated and reiterated the principle that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Connick v. Meyers, 461 U.S. 138, 145 citing Roth v. United States, 354 U.S. 476, 484 (1957). As noted by the Court, speech on public issues occupies the "highest rung on the hierarchy of First Amendment values" and is entitled to "special protection." Id. at 145. "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 387 (1987). As the Rankin Court observed:

> "Debate on public issues should be uninhibited, robust, and wide-open. . . and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 387, citing New York Times Co. v. Sullivan, 379 U.S. 254, 270 (1964). The right to be free of retaliation under the First Amendment protection is so important that even erroneous and false statements are protected, provided the employee did not act with a reckless disregard for the truth. Pickering v. Bd. of Education, 391 U.S. 563, 574 (1968). This Court has held that a teacher's statement about a school board's dress code published to a local radio station related to a matter of public concern. Mount Healthy School Board v. Doyle, 429 U.S. 274 (1977). The Court has also held that an employee's statement that she hoped an the next

assassination attempt of President Reagan was successful was of public concern. Rankin, supra. These cases demonstrate the Court's adherence to the principle that debate on public matters should not be stifled.

Here, no less than Pickering, Doyle, Rankin, Rahn spoke as a citizen concerned about political and social issues important to the public that had no bearing on her personal employment situation.

1. The Sixth Circuit Has Misapplied Connick

The test to determine whether speech is about a matter of public concern was set forth in Connick. When an employee comments as a citizen upon matters of "political, social or other concern to the community," the speech is a matter of public concern. 461 U.S. at 147. When an

employee speaks upon matters of "only personal interest," absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." Id. (emphasis ours).

In Connick, a prosecutor angered by her supervisor's decision to transfer her to another section of the office, circulated a 14-question petition to co-workers. Thirteen of those questions related solely to internal office policy. One, however, sought input about whether co-workers felt pressured to work on political campaigns. Connick was plainly disgruntled. She complained about her boss. She had a vendetta against him. She turned a personal employment dispute into a "cause celebre." 461 U.S. at 148. Still, the Court held that because one small part of Connick's speech regarding pressure to work on

campaigns related to a matter of public concern, her right to speak out had to be balanced against the employer's interest in its efficient operation.

The majority opinion from the Sixth Circuit accurately stated the law:

> ". . ., if any part of the employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct the balancing of interests test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968). See Rankin; 483 U.S. at 384; Connick, 461 U.S. at 149-50.

(Slip Opinion at 10). (emphasis ours). However, the court failed to put Rahn's speech in its proper context. It held that no part of her speech related to matters of public concern. It concluded that Rahn was speaking only as an employee about internal hospital matters. Yet,

the overwhelming evidence was that Rahn was a politically active and civic minded individual whose speech was motivated by a sincere desire to educate the public and insure continuing care for the indigent patients at Drake. Even before her speech, she worked at the polls in May of 1989 to garner support for the Drake Tax Levy. She contacted the County Commissioner's office in early June of 1989 with questions about the new Drake structure. She worked with patients about their concerns after Gilreath announced 75% of them would be transferred. She was concerned that patient care could suffer because of employee absenteeism and poor morale. She chaired the Committee to Maintain Drake Hospital, a group comprised of patients, family members, employees and other interested members of the public.

Rahn was not an employee like Connick with a vendetta. She had no on going employment dispute with Drake. She had not been transferred, disciplined or terminated at the time of her speech. Her job was not in jeopardy. Her speech was not in response to any action taken against her. It was not an afterthought. As an employee, she had nothing to gain by voicing her concerns about the allocation of levy funds, Gilreath's statement about spending bond money any way he wanted; or by serving as the Chair of the Committee. In fact, she recognized that her speech could lead to her termination.

Even if some part of Rahn's speech could be characterized as personal, there is no question that she sought to advise the public, who voted to approve the tax levy, that Gilreath was spending their money on flowers instead of

patient care, and had openly stated that he would spend more bond money any way he wanted. The First Circuit stated the analysis succinctly:

> "Connick requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern because they are of public concern? Or was the point to further some purely private interest?

O'Connor v. Stevens, 944 F.2d 905, 913 (1st Cir. 1993) citing Linhart v. Glatfeltner, 771 F.2d 1004,1010 (7th Cir. 1985). Reviewing the "content form and context" of Rahn's speech "as revealed by the record," Connick, 461 U.S. at 146-148, leads to the inescapable conclusion that her "point" was to educate the voters, the public, and the local government officials charged with overseeing Drake Hospital about how the hospital was being operated.

In sum, Rahn spoke not as an employee solely about personal matters. Instead, as demonstrated below, and as the district court and as Judge Keith observed in dissent, a substantial portion of Rahn's speech addressed topics which this Court determined in Pickering to be matters of public concern.

2. Rahn's Speech Regarding How Tax Funds Were Being Spent Related To A Matter Of Public Concern and the Opinion Of The Sixth Circuit Is In Direct And Irreconcilable Conflict With This Court's Decision In Pickering

The "keystone of any inquiry relating to the free speech rights of employees is the Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 (1968)." Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983). In Pickering, a teacher wrote a letter to the editor of a local newspaper. The Court described the

teacher's letter as:

> ". . . basically an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue."

Id. at 566). Pickering also complained about the school board's "method of informing taxpayers about the need for additional revenue." Id. at 569-70. The Court held Pickering's letter was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-572. The Court also noted that speech by employees serves an important role:

> ". . . the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision by the electorate. Teachers are, as a class, most likely to have informed opinions as to how funds allotted to operation of the school should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72.

Like Pickering, Rahn spoke about a bond issue and the way the funds were spent:

> "Mr. Gilreath has gathered "his" people in the administration to attain his personal desires for the direction of the County

hospital, which has historically served the needs of County residents in need of long-term rehabilitation and care. Contrary to this long-standing purpose of the County hospital, Gilreath has been heard to say, "I'll use that $100,000,000 bond issue over the next five years any way I want to." . . .

Mr. Gilreath and his assistant Michael Bradford perceive the "New Drake" as a "Private Hospital" which is not subject to the scrutiny of citizens of Hamilton County who have just voted in a $20,000,000 per year bond levy for the next five years. The question is, did the citizens vote for a private country-club like facility lavishly landscaped with expensive flowers after Mr. Gilreath had previously ordered all existing plantings removed from the front of the hospital or a facility to provide long-term care and therapy for the more needy citizens of Hamilton County?

Was the voter approval of the

> Bond Levy a mandate to purge all the existing staff and patients at Drake Hospital?
>
> WE HOPE NOT!!!"

(Slip Opinion at 7-8). (emphasis ours).

In the passage quoted above, Rahn raised concerns almost identical to those in Pickering. Both employees spoke about a bond issue. Both complained about the method of informing the public about how the funds would be used, and both complained about the allocation of funds: Pickering spoke about money spent on athletics instead of academics; Rahn complained about money spent on landscaping and flowers instead of patient care. Finally, both Pickering and Rahn used the media to make their concerns known.

Ignoring Pickering, the Sixth Circuit simply stated:

> "Here, the fact that Rahn believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern."

(Slip Opinion at 12). Yet, Pickering makes it clear that how tax dollars are spent is a matter of public concern. The Drake Tax Levy was a matter decided by popular vote. Like the need for the bond issue in Pickering, the spending of those funds was a subject about which Rahn had an informed opinion and about which the electorate had a right to know. The public voted to use the bond money to save Drake Hospital. Gilreath was using the money for flowers. There was a difference of opinion between Rahn and Gilreath regarding how these funds should be spent and how Drake Hospital should be operated. Addressing this point, the Court in Pickering stated:

> "Certainly an accusation that too much money is being spent on athletics by the administrators of the school system. . . cannot reasonably be regarded as per se detrimental to the district schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school systems, a difference of opinion that clearly concerns an issue of general public interest."

391 U.S. at 571. (emphasis ours).

Opinions about how tax dollars are spent to operate a public hospital are no less a matter of public concern than opinions about how a school board allocates money between athletics and academics. It is these differing opinions which the First Amendment was designed to foster to bring out about political and social changes. Connick, 461 U.S. at 138. Because of Rahn's speech, the public may think twice about voting

for another levy for Drake Hospital.

In addition, Rahn's speech went beyond whether tax dollars were being "spent wisely." She brought to the public's attention Gilreath's statement, which was never denied, that he was going to spend 100 million dollars of bond money "any way he wanted." The statement can be read to mean that Gilreath was not only acting "unwisely," but potentially, illegally. The latest pronouncement from the Sixth Circuit now has created a direct conflict with the Second Circuit which held in Rookard v. Health and Hospital Corp., 710 F.2d 41 (2nd Cir. 1983) that allegations of corrupt and wasteful practices at a large municipal obviously relate to a matter of public concern.[1]

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[1]Other circuits have followed Pickering and had little difficulty finding that speech generally about the spending of public funds

There is no substantial difference between Rahn's speech and Pickering's speech. The Sixth Circuit has ignored the public concerns raised by Rahn's speech which have already been determined by this Court to be protected.

3. Rahn's Statements About Possible Patient Endangerment Are Matters Of Public Concern

In her press release, Rahn pointed out

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relates to a matter of public concern. See O'Connor v. Stevens, 944 F.2d 905, 915 (1st Cir. 1993)(allegations of improper purchases clearly a matter of public concern); Stroman v. Collection County School District, 981 F.2d 152 (4th Cir. 1992)(allegations of mismanagement of school budget relate to matter of public concern); Shands v. City of Kenneth, 993 F.2d 1337 (7th Cir. 1993)(use of city funds to purchase firefighting equipment is a matter of public concern); Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992)(use of retirement funds to balance budget a matter of public concern); and Martinez v. City of Opa-Locka Florida, 971 F.2d 708 (11th Cir. 1992)(expenditure of funds in violation of City ordinance clearly addresses matter of public concern). The opinion of the Sixth Circuit conflicts with those in other circuits.

that new work rules at Drake caused widespread discontent among the hospital staff which created high absenteeism and a possible situation of patient endangerment. (Slip Opinion at 8). The panel stated there was "no tenable argument" that this was but anything an "employee grievance with new administration." Rahn's statement may reflect some dissatisfaction with the new administration, but the focus of that dissatisfaction was its effect on the patients. An employee concerned only about a personal grievance would not have said anything about the effect of absenteeism on patient care.

As Judge Keith pointed out in his dissent, there should be no question that the quality of care provided to indigent residents at a County-owned and taxpayer funded hospital is a matter of public concern. The "quality of health

care given to any group of people, including, inmates, is a matter of public concern." Frazier v. King, 873 F.2d 820, 825-26 (5th Cir.). cert denied, Davoli v. Frazier, 493 U.S. 977 (1989). In Churchill v. Walters, 977 F.2d 1114 (7th Cir. 1992), vacated and remanded, ____ U. S. _____, 9 IER cases 801 (1994) the Court held:

> "There can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speaking about matters of public concern."

Id. at 1117. (emphasis ours). In Walters, as here, the nurse complained about short-staff and its potential consequences on patient care.

Moreover, to the extent the panel held that Rahn's concerns a about potentially dangerous situation did not warrant protection

because nothing bad had actually occurred, it erred and created an unacceptable new test. We are aware of no authority from this Court holding that for speech to relate to a matter of public concern, an employee must wait until the corruption, waste or perceived danger actually occurs. Such a requirement would defeat the purpose of encouraging employees who are in a position to see potential dangers and inform the public about them.

CONCLUSION

The Sixth Circuit's decision cannot be reconciled with Connick, Pickering, Doyle, and Rankin. It conflicts with the Second Circuit's decision in Rookard. Rahn's speech was no less deserving of protection than Doyle's complaint about a dress-code, Rankin's remark about the

attempted assassination of President Reagan, or Pickering's letter to the editor. The Sixth Circuit's decision takes away the free speech rights this Court has established time and time again. Speech about the spending of public monies which this Court has held relates to a matter of public concern will no longer be protected in the Sixth Circuit. Petitioner respectfully asks this Court to grant our petition, correct the error of the Sixth Circuit, and vacate the decision below.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing document has been served by ordinary U.S. Mail to Robert S. Brown, Esq., of Brown, Cummins & Brown Co., L.P.A., 3500 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, on this 6th day of April, 1995.

David Torchia

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0283P (6th Cir.)
File Name: 94a0283p.06

Nos. 92-4041; 93-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSEMARY RAHN,
Plaintiff-Appellee,

v.

DRAKE CENTER, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed August 8, 1994

Before: KEITH and NORRIS, Circuit Judges; and ZATKOFF, District Judge.*

ZATKOFF, District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. KEITH, Circuit Judge (pp. 18-20), delivered a separate dissenting opinion.

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*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

ZATKOFF, District Judge. Defendant-appellant Drake Center, Inc. ("Drake Center") appeals several orders entered by the district court[1] in this 42 U.S.C. § 1983 action where plaintiff-appellee Rosemary Rahn ("Rahn") prevailed on her claim that Drake Center discharged her in violation of her First Amendment rights. Specifically, Drake Center appeals the denial of its directed verdict motion on the issues of state action and protected speech; the denial of its motion for judgment as a matter of law, or in the alternative, motion for a new trial on the issue of its affirmative defenses; the award of punitive damages to Rahn; three separate evidentiary rulings; and the award of attorney fees and costs. Finding that Rahn's First Amendment rights were not violated in this case, we REVERSE the district court and VACATE the judgment entered in this action. We do not reach the merits of the other issues raised in this appeal.

I.

A.

Rahn brought this § 1983 action claiming Drake Center discharged her in violation of her First Amendment rights. After the close of discovery, Drake Center filed a motion for summary judgment which was denied.

A jury returned a verdict in favor of Rahn, awarding her compensatory damages, as well as punitive damages. Judgment was entered on the compensatory damage portion of the verdict, while the district court reserved entry of judgment on the punitive damages until the issue could be fully briefed by the parties. Drake Center filed a motion for judgment as a matter of law, or in the alternative, a motion for a new trial, as well as its opposition to the punitive damage award. The district court denied Drake Center's motion in its entirety and entered judgment on the

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[1]The parties consented to a final determination by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

punitive damages award. Drake Center timely appealed (No. 92-4041). Thereafter, the district court entered judgment awarding Rahn attorney fees in the amount of $56,244.00 and costs in the amount of $3,059.59. Drake Center timely appealed this judgment (No. 93-3170). The appeals were consolidated.[2]

B.

In order to provide a proper context within which to discuss Rahn's claim that her First Amendment rights were violated, the following background is required. Prior to 1989, Daniel Drake Memorial Hospital ("DDMH"), a hospital established pursuant to Ohio Revised Code Chapter 339, was a public institution owned and operated by Hamilton County, a political subdivision of the State of Ohio. DDMH employed Rahn as a licensed practical nurse starting in 1982. In February 1988, DDMH hired a new administrator, Earl Gilreath ("Gilreath"), to institute major changes necessary to regain the hospital's accreditation and Medicare certification, which were lost in January and February 1988, in the wake of the "Donald Harvey incident."[3] DDMH obtained its reaccreditation and Medicare certification while Gilreath was the administrator.

In 1989, Hamilton County decided to cease operating DDMH and to lease the facilities to a private corporation pursuant to O.R.C. § 140.45. Gilreath was instrumental in orchestrating the change. Drake Center is a private nonprofit Ohio corporation, which was created on May 17, 1989. On June 2, 1989, Hamilton County and the

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[2]Drake Center's appeal of the award of attorney fees and costs is based upon their success in the appeal on the merits. Drake Center does not otherwise dispute the award of attorney fees and costs.

[3]Donald Harvey was a former nurse's aide who admitted to killing 24 patients at DDMH in 1987. Without its medicare certification, DDMH was not able to admit seriously ill patients which comprised a majority of DDMH's admissions.

University of Cincinnati entered into a written agreement which provided for the continued operation of the DDMH facilities through a lease of the facilities to Drake Center and set forth the obligations of the parties. Sections 3.1 and 3.2 of the agreement provided that Hamilton County would agree to use its best efforts to pass the "Drake Hospital tax levy" in the Spring, 1989 (which was eventually passed) and to annually transfer the proceeds of the levy to Drake Center subject to the lease and operating agreement between Hamilton County and Drake Center.[4]

Gilreath was appointed the president of Drake Center and Chief Executive Officer. Gilreath assigned to Michael Costa, Drake Center's Vice President of Human Resources, responsibility for all personnel decisions, including hiring, disciplining, and firing employees, except the medical staff and the officers reporting directly to the President of the Board of Trustees. Rahn applied for and obtained the position of licensed practical nurse with Drake Center effective July 1, 1989.

Effective July 1, 1989, Drake Center established a three month orientation period for all of its employees, including all former DDMH employees it hired. Drake Center's Orientation Policy provided that "employees who accumulate three points (as specified in the attendance guide) will have employment terminated." Under the terms of Drake Center's Attendance Policy, employees with an unscheduled absence for one day are assessed one point. When employees do not give proper notice of such absence,[5] they are assessed two points. The section of the Attendance Policy titled "Absent No Show No Call" states

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[4]Hamilton County and Drake Center also entered into the lease and operating agreement on June 2, 1989, providing that effective July 1, 1989, Hamilton County would lease the DDMH facilities to Drake Center.

[5]Proper notice requires that the employee give notice at least one hour before the scheduled shift.

that "a failure to report an absence for the entire scheduled shift shall be dealt with as a serious issue under the disciplinary policy."

On July 18, 1989, Rahn was assessed one point under the attendance policy for an unscheduled absence. According to the schedule that was printed on July 12, 1989 -- for the period July 16, 1989 through August 12, 1989 -- Rahn was scheduled to work the day shift on July 21, 1989. The day shift is 7:00 in the morning to 3:30 in the afternoon. On July 21, 1989, Rahn was assessed two points under the attendance policy for being absent from work without proper notice. Costa had the following written notice delivered to Rahn by courier at approximately 4:00 p.m. on July 21, 1989:

> The purpose of this letter is to advise you that you have accumulated three points for an unscheduled absence on July 19, 1989 [sic], and being absent without notice on July 21, 1989. Unscheduled absences and being absent without call can cause a problem delivering patient care. It is for this reason that employees in orientation who accumulate three points will have employment terminated. You were advised of Drake Center's orientation guideline on July 10, 1989.
>
> Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guidelines as soon as possible but, no later than noon on July 22, 1989.

Rahn informed Drake Center, on July 22, 1989, that she was not aware that she had been scheduled to work on July 21, 1989. On July 25, 1989, Costa and Rahn discussed, via telephone, her failure to appear. Rahn again stated that she was not aware that she was scheduled to work and Costa responded that it was Rahn's responsibility to check the schedule.

On July 26, 1989, Costa directed a letter to Rahn, which included the following statements:

> The reason you gave for the July 21, absence, was that you didn't know you were scheduled [to work]. The schedule was posted July 12, you worked July 17, 1989. As you indicated, you realize that you are responsible for knowing your schedule. . . . The orientation guidelines indicate that an employee in orientation who receives three (3) points, will be terminated. Your employment is therefore terminated.

C.

In 1989, Rahn worked at voting polls supporting the tax levy for the then Hamilton County operated DDMH. The tax levy passed. On July 1, 1989 an article appeared in a local newspaper quoting Gilreath as saying he intended to move 75% of Drake Center's patients to private facilities. Sometime after the publication of this article, a group known as the "Committee to Maintain and Improve Drake Hospital" ("the Committee") was formed. The group consisted of employees, patients, patients' family members, and local citizens. Rahn was the Chairperson of the Committee.

On July 18, 1989, the Committee prepared a press release to distribute to the University of Cincinnati, the Administrators of Hamilton County, Gilreath, and the media. Rahn delivered the typed press release at DDMH at approximately 3:30 p.m. on July 18, 1989.[6] The press release reads as follows:

> Today, Rosemary Rahn, chairman of a committee including Drake Hospital Staff Members, Drake Hospital Patients, Families of Drake Hospital Patients and Citizens of Hamilton

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[6]Rahn was scheduled to work on July 18, 1989.

County, announced the formation of a committee to preserve the existing human resources, maintain the facility and encourage improvement at the "County Hospital."

The Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray. Adding fuel to the fire of confusion and discontent has been the appointment by Hamilton County Commissioners of Earl Gilreath to resolve the discreditation problem and to spearhead the passing of the most recent bond issue. To give the "Devil" his due, Mr. Gilreath attained the recreditation of Drake Hospital and the passing of the most recent bond issue. However, Mr. Gilreath and his assistant Michael Bradford's strong arm and closed door tactics in the operation of the hospital at this time must be exposed to the glare of sunshine.

Mr. Gilreath has gathered "his" people in the administration to attain his personal desires for the direction of the County hospital, which has historically served the needs of County residents in need of long-term rehabilitation and care. Contrary to this long-standing purpose of the County hospital, Gilreath has been heard to say, "I'll use that $100,000,000 bond issue money over the next five years any way I want to." Further, he has said, "I've built a wall between the University of Cincinnati and Drake Hospital--they will only be sending patients and residents to the County Hospital." He has intimated he will maintain complete control over Drake along with the help of his carefully selected henchmen.

Mr. Gilreath and his assistant Michael Bradford perceive the "New Drake" as a "Private Hospital" which is not subject to the scrutiny of citizens of Hamilton County who have just voted in a $20,000,000 per year bond levy for the next five years. The question is, did the citizens vote for a private country-club like facility lavishly

landscaped with expensive flowers after Mr. Gilreath had previously ordered all existing plantings removed for the front of his hospital or a facility to provide long-term care and therapy for the more needy citizens of Hamilton County?

Was the voters' approval of the Bond Levy a mandate to purge all the existing staff and patients at Drake Hospital. *WE HOPE NOT!!!*

This Committee hopes for clarification and the reasons for actions in the following areas:

(1) New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation.

(2) Failure of the administration to publish the short and long range goals for the hospital and a complete disregard for the input that the hospital staff, patients and relatives and citizens of Hamilton County might have to make.

(3) Failure to disclose the actions and philosophies of the new Hamilton County - University of Cincinnati corporation formed to operate the hospital.

(4) A desire to have specific information about the staffing, budget and desired patient mix provided by the administration instead of glittering generalities and honeycoated, meaningless slogans.

(5) The desecration of employee benefits and retirement funds without counseling with the staff prior to making changes. This move has again created widespread discontent among the hospital staff.

Specific examples of indiscretions of Gilreath and his group are listed in an exhibit attached to this release.

The Committee has made this information available to the new Drake Hospital Board of Directors, Mr. Thomas Wenz, Hamilton County Administrator, Dr. Joseph A. Steger, President of the University of Cincinnati, and Dr. Donald C.

> Harrison, Senior Vice-President, University of Cincinnati Medical Center.
>
> The Committee is calling for an immediate open meeting among the County Commissioners, University of Cincinnati officials, Drake Hospital Administrators, and the Citizens of Hamilton County, Drake Hospital Staff, Drake Hospital Patients and Relations to discuss matters set forth in the press release along with the operating statistics, budget and patient goals of the hospital.
>
> Questions may be directed to the Chairman, Rosemary Rahn, at . . . . Ms. Rahn will attempt to present this press release at Drake Hospital to Administrator Gilreath at 4:30 p.m. today, July 18, 1989, and ask for the Administrator's resignation and a new, progressive, positive and capable Administrator. (emphasis in original).

Rahn also appeared on a local television station's evening news program that night. A jury returned a verdict in favor of Rahn, finding that Drake Center discharged Rahn not because she had accumulated 3 points under the Attendance Policy, but for Rahn exercising her First Amendment rights in the press release.

II.

For the purpose of this appeal, this Court will assume that state action is present. The determination of whether a plaintiff has been terminated for exercising her first amendment right requires a two-step process. *Williams v. Commonwealth of Kentucky*, No. 93-5222/5656, slip op. at 13 (6th Cir. May 26, 1994). "The threshold inquiry is whether the speech that [plaintiff] cites as the basis for her removal and discharge may be fairly characterized as constituting speech on a matter of public concern." *Id.* at 13 (quoting in part *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)) (internal quotation marks omitted). *See also Connick v. Myers*, 461 U.S. 138, 146 (1983). Whether a plaintiff's speech addresses a matter of public concern is a question of law, requiring de novo review by this Court.

Barnes v. McDowell, 848 F.2d 725, 733 (6th Cir. 1988). If a plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. *Id.*

However, if any part of an employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See Rankin*, 483 U.S. at 384; *Connick*, 461 U.S. at 149-50. The court, as part of the ultimate issue of whether the speech is protected, is required to:

> "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employee's speech.

Rankin, 483 U.S. at 384.

Here, Drake Center's sole attack is on whether the press release addressed a matter of public concern.[7] The determination of whether Rahn's statements contained in the press release addressed matters of public concern must be based on the content, form, and context of the statement, as revealed by the whole record. *Id.* at 146-48. In order to qualify as addressing a matter of public concern, this court must be able to fairly characterize the expression as relating to any matter of political, social, or other concern to the community. *Id.* In addition, the entire speech of the employee does not have to address matters of public concern, as long as some portion of the speech touches upon matters of public concern. *Connick*, 461 U.S. at 149.

The complete record in this appeal reveals that the press release does not touch upon matters of public concern. The crux of Rahn's argument is that the public was presented with a tax levy to help support DDMH when it was purely a public institution. After the levy passed, a private corporation, Drake Center, was formed to manage DDMH. As stated by plaintiff's counsel during oral arguments, Drake Center, the private entity, never would have come into existence without the tax levy being passed. And now Gilreath was going to spend the taxpayers money any way he wanted, and not necessarily in the best interest of the taxpayers. In addition, Rahn contends because the press release addressed "patient endangerment" that it addressed a matter of public concern.

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[7]At trial, Drake Center argued even if the press release touched upon a matter of public concern that Drake Center discharged Rahn due to the accumulation of 3 points under the Attendance Policy. Thus, Drake Center did not argue at the trial level, or on appeal, that under the *Pickering* balancing test its interest in operating the hospital outweighed Rahn's interest in making the statement. As noted above, the jury found that Drake Center discharged Rahn because of the press release and not because she had accumulated 3 points under the Attendance Policy.

This Court in *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), cited with approval *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985), where the District of Columbia Circuit held that since matters involving public monies and government efficiency may be raised in connection with virtually any public employment matter, they could not be used to convert an issue into one of public concern within the stricture of *Connick*.

> We agree with the District of Columbia Circuit's in *Murray*. The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.

Barnes, 848 F.2d at 734.

Here, the fact that Rahn believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern. In addition, the reference to "patient endangerment" does not make this a matter of public concern under the facts in this case. The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new *work* rules which *might* lead to a patient endangerment situation. This is "nothing more than [an] example[] of the quintessential employee beef:

management has acted incompetently." *Barnes*, 848 F.2d at 735.[8]

The conclusion that the press release did not touch upon matters of public concern also is not changed by the fact that the statement was made in a press release or that a local television station interviewed Rahn. In *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988), this Court held that statements made by a public employee which were printed in a newspaper were deserving of First Amendment protection because, in part, the media covered the story and as a consequence the employee's statement touched upon a matter of public concern. *Id.* at 613. The *Matulin* Court reasoned that although the employee may have a personal stake in the substance of the interview, the "finding of public concern is . . . strengthened by the fact that the plaintiff did not solicit the attention of the media, but simply responded to questions regarding an existing controversy." *Id.* Unlike the plaintiff in *Matulin*, who was contacted by a newspaper and did not herself initiate the interview, Rahn issued the press release to the media in an attempt to obtain media exposure when she delivered it to DDMH in the afternoon of July 18, 1989. Under these

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[8]Rahn relies on *Monsanto v. Quinn*, 674 F.2d 990 (3rd Cir. 1982) in support of her position that possible patient endangerment is a matter of public concern. *Monsanto*, however, is easily and significantly distinguishable from the instant appeal. In *Monsanto*, an employee of the tax division of the Virgin Islands wrote several letters to the head of the tax division. At least one of the letters stated that several employees of the tax division had attempted to defraud the government by filing fraudulent tax returns. The employee claimed that these problems in the tax division were impairing the effectiveness of the division's tax-collecting operations. *Id.* at 991. The Third Circuit held that the letters touched upon matters of public concern, because they exposed corruption and inefficiency.

Here, on the other hand, the press release did not disclose any fraud being committed. In addition, the press release speculated that the new work rules might create a possible patient endangerment situation. The press release did not state that a patient endangerment situation existed at the present moment. Therefore, Rahn's reliance on *Monsanto* does not change this Court's conclusion.

circumstances, the fact that a local television station reported the issuance of the press release on its local news that night, does not change the conclusion that the press release did not touch upon a matter of public concern, because Rahn initiated the contact with the media.

Moreover, this is not a case where the public employee has "uncovered" a fraud being committed on the taxpayers. *Cf. Solomon v. Royal Oak Twp.*, 842 F.2d 862, 865 (6th Cir. 1988) ("This Court has held that speech *disclosing* public corruption is a matter of public interest and therefore deserves constitutional protection.") (citations omitted) (emphasis added). The relationship between Hamilton County, University of Cincinnati, and Drake Center was the subject of various newspaper articles before the press release was issued. In addition, the fact that Gilreath sought to make 75% of the beds private also was disclosed in an earlier newspaper article. Therefore, the press release did not "disclose" any public corruption. The public was aware of the facts.

During oral argument, counsel for Rahn stated that Rahn was exposing corruption because the landscaping contracts were awarded to the Administrator's wife. The press release, however, did not mention this. The press release merely stated that new landscaping had been done at the hospital and questioned whether this was money well spent. There is no evidence linking any of the allegations to corruption at Drake Center. As the *Barnes* Court noted:

> While Thompson may have been justified in his beliefs that his section of the Business Enterprises Program did not receive enough of the operating budget, that the Program should have had a 24-hour repair deadline before he instituted one and *that the wisdom and propriety of some of the Program's purchasing practices was questionable, he presented no evidence linking any of these charges to corruption in the Bureau or in the Program.* Consequently, instead of having addressed a matter of public concern, Thompson's

> complaints appear to be nothing more than examples "of the quintessential employee beef: management has acted incompetently."

Id. at 734 (citation omitted) (emphasis added).[9]

As was the case in *Barnes*, the press release before this Court is most accurately characterized as an employee grievance concerning internal office policy. This is best illustrated by examining the five areas on which the Committee sought clarification. The first area was "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." There is no tenable argument that this is anything else besides an employee grievance with the new administration. The second area addressed the "[f]ailure of the administration to publish the short and long range goals for the hospital and a complete disregard for the input that the hospital staff, patients and relatives and citizens of Hamilton County might have to make." Again, the key here is the lack of input from the hospital staff on the goals of the hospital. It can always be claimed that the citizens might wish to have some input on the goals of the public institution. In almost every public employee case brought under the First Amendment, the employee could contend that the public might wish to air their views on the goals of any public institution.

The third area addressed the "[f]ailure to disclose the actions and philosophies of the new Hamilton County - University of Cincinnati corporation formed to operate the hospital [Drake Center]." In this case, this statement is

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[9]The district court held that the press release could fairly be read to support a conclusion that it charged Gilreath with corruption. For the reasons set forth in the text, this Court finds that the press release cannot be fairly read as charging Gilreath with corruption. At best, the press release charges Gilreath with not spending money in a wise fashion with respect to the landscaping of the hospital. This does not constitute a matter of public concern. *See Barnes*, *supra*.

most accurately characterized as the employees complaining about the new administration and the changes in the work rules. The fourth area dealt with "[a] desire to have specific information about the staffing, budget and desired patient mix provided by the administration instead of glittering generalities and honeycoated, meaningless slogans." Again, this statement reflects the employees' dissatisfaction with the new administration and does not touch upon a matter of public concern. Finally, the fifth area the Committee sought clarification on was "[t]he desecration of employee benefits and retirement funds without counseling with the staff prior to making changes. This move has again created widespread discontent among the hospital staff." The fifth area underscores the conclusion that this press release relates to matters of the employees' interest at Drake Center and does not relate to matters of public concern. The overall tone of the five areas of interest in the press release reveal that the press release is an employee grievance, couched in a press release from the "Committee."

Moreover, the press release characterized Gilreath as "the devil" and asked for his resignation "and a new, progressive, positive and capable Administrator [to be named]." This language also supports the conclusion that this press release was actually the quintessential employee beef from disgruntled employees.

Thus, despite Rahn's assertion to the contrary, the press release, while from the Committee, did not address the interest of non-employees with respect to improving DDMH. Rather, Rahn spoke for herself and other employees through the Committee. Finally, the mere fact that the Committee was seeking an open meeting with "the County Commissioners, University of Cincinnati officials, Drake Hospital Administrators, the Citizens of Hamilton County, Drake Hospital Staff, Drake Hospital Patients and Relations" does not change the outcome in this case. In almost any public employee case, the public employee can assert that he or she wishes an open meeting with the governmental agency and the citizens of the local

community to discuss the issues. Thus, this is not very relevant in determining whether this is a matter of public concern.

Thus, this Court finds that the press release did not touch upon a matter of public concern, and therefore was not deserving of First Amendment protection.

III.

Accordingly, we REVERSE the district court and VACATE the judgment entered in this action.

DAMON J. KEITH, Circuit Judge, dissenting. While the majority opinion correctly cites the applicable law in the instant case, I disagree with the conclusion that the speech contained in Rahn's press release was not a matter of public concern. The majority's painstaking consideration of each element of Rahn's press release disregards the impact of the press release as a whole and the context in which it was written. Because the press release addressed a matter of public concern, it is entitled to First Amendment protection. I, therefore, respectfully dissent.

Whether speech addresses a matter of public concern is determined by examining the "intent, form and context of a given statement as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Speech addressing matters of public concern encompasses "issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *Id.* at 147.

Here, although the press release noted certain employee grievances, a substantial portion addressed matters of public concern. For example, Rahn's speech attacked the management of Drake Hospital, the local hospital which provided services to the indigent. The attack discussed a recent tax levy that provided funds for Drake Hospital. After the levy was passed, Drake Center corporation was formed to manage Drake Hospital. Rahn's speech directly addressed Drake Center's and Gilreath's use of tax levy dollars to manage the hospital.

As the majority notes, the fact that speech concerns government expenditures and efficiency does not automatically qualify speech as addressing a matter of public concern. *See Barnes v. McDowell*, 848 F.2d 725, 733 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). In the instant case, however, the press release discussed the management of Drake Hospital, the formation of the Drake Corporation, and the conversion of 75% of the hospital beds to private status. All of these topics received

substantial media attention in the summer of 1989. They certainly were extremely important to the locality, and are thus worthy of First Amendment protection.

While media coverage itself does not convert a private matter into a matter of public concern, it provides evidence that the matter is of import to the locality. Moreover, the speech also addressed the potential endangerment of patients which is clearly a matter of public concern. *See Frazier v. King*, 873 F.2d 820, 825-26 (5th Cir.) (agreeing "the quality of health care given to any group of people, including inmates, is a matter of public concern"), *cert. denied*, *Davoli v. Frazier*, 493 U.S. 977 (1989); *see Smith v. Cleburne County Hospital*,[1] 870 F.2d 1375, 1383 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989); *see also Casey v. City of Cabool, Mo.*, 12 F.3d 799, 802-03 (8th Cir. 1993) (holding criticism of public officials during a discussion of city policy was a matter of public concern).

Clearly, health care is important to the American public. Perhaps the most important political debate of the 1990's is the interplay between health care and the public's tax dollars. This debate has raged both nationally and locally, and definitely involves matters of public concern.[2]

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[1]Notably in *Cleburne*, the Eighth Circuit determined a doctor's initial criticism of a local hospital was a matter of public concern. *Cleburne*, 870 F.2d at 1381. The court further found, however, that to the extent the speech was personal and spiteful attacks against individuals, it was disruptive and unprotected, and therefore, provided an independent basis for recommending the suspension of the doctor's privileges. *Id.* at 1383-84.

[2]*See also* Symposium, *The Law and Policy of Health Care Rationing: Models and Accountability*, 140 U. Pa. L. Rev. 1505 (May 1992); Susan Elizabeth Powley, *Caring for the Nation -- Current Issues in Health Care Reform*, 45 Vand. L. Rev. 869 (May 1992); Kenneth R. Wing, Symposium, *American Health Policy in the 1980's: The Legal Implications of Health Care Cost Containment*, 36 Case W. Res. L. Rev. 608 (1986); Charles D. Weller, Symposium, *"Free Choice" as a Restraint of Trade in American Health Care Delivery and Insurance*,

Notably, the Third Circuit discussed health care and found that "the quality, availability and cost of health care are among the most important and debated issues of our time." *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 915, 917-19 (3rd Cir. 1990).

The debate over the provision of and payment for health care squarely falls within the heart of the First Amendment. Its protection should extend to the debate on health care reform, even where it occurs at a local level, as in the instant case.

Viewing the intent, form, and context of Rahn's speech as revealed by the whole record, I would conclude the speech was a matter of public concern, and therefore, entitled to protection.

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69 Iowa L. Rev. 1351 (July 1984); David Lauter, *Clinton Challenged on Cost of Health Care to Employers*, L.A. Times, April 8, 1994, at A17; Gerald F. Seib, *Clinton's Choice: Left or Right in Health Care?*, Wall Street Journal, Nov. 24, 1993, at A18; Sara Fritz, *U.S. Cautiously Awaits Clinton Health Program*, L.A. Times, Sept. 19, 1993, at A1; Joseph F. Sullivan, *Health Care Program Endorsed*, New York Times, Nov. 6, 1991, at B6 col. 1.